73

(4)

No. 07-538

FILED
NOV 20 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

ARTHUR P. CHRISTIE, ANTHONY L. ALFORD, DANIEL E. DEIGHTON, FREDERICK W. JENNART, DAVID N. HARVEY, M.D., MICHAEL A. HELLWEGE, M.D., F. HUNT SANDERS, M.D., RICHARD J. SULLIVAN, M.D., TITUS A. TAUBE, M.D., C. SCOTT EDENFIELD, M.D., RAHIL KAZI, M.D., RICHARD L. HEATON, M.D., BRITTON L. PILCHER, M.D., SANTANU DAS, M.D., THOMAS C. JOHNSON, M.D., RICHARD B. ELLIS, M.D., HOSPITAL AUTHORITY OF HOUSTON COUNTY d/b/a/ HOUSTON MEDICAL CENTER,

Petitioners,

v.

RUSSELL E. ADKINS, M.D.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ALTHEA L. BUAFO (*Counsel of Record*)
Georgia Bar No. 092065
BERNADETTE C. CRUCILLA
Georgia Bar No. 199001
BUAFO & ASSOCIATES
201 Spring Street – P.O. Box 4012
Macon, Georgia 31208
(478) 743-8337

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether this Court should create a privilege against the disclosure of confidential medical peer review documents in the limited context of federal civil rights actions which allege discrimination within the peer review process, itself.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF FACTS AND COURSE OF PROCEEDINGS BELOW	1
INTRODUCTION	1
SUMMARY OF THE ARGUMENT	2
REASONS FOR DENYING THE PETITION	5
CONCLUSION	23

TABLE OF AUTHORITIES

Page

CASES

UNITED STATES SUPREME COURT CASES

Jaffee v. Redmond, 518 U.S. 1, 116 S.Ct. 1923 (1996) ..... *passim*

University of Pennsylvania v. EEOC, 493 U.S. 182, 110 S.Ct. 577 (1990) ..... *passim*

ELEVENTH CIRCUIT CASES

Christie, et al. v. Adkins, 488 F.3d 1324 (11th Cir. 2001) 1, 4

DISTRICT COURT CASES FOR THE ELEVENTH CIRCUIT

Azeez P. Adeduntan v. Hosp. Auth. Of Clarke County, 2005 WL 2074248 (M.D.Ga.) 16

Blaubergs v. Bd. of Regents of Univ. System of Georgia, 661 F.2d 426 (5th Cir. 1981) 21

Marshall v. Americus-Sumter County Hosp. Authority, 2002 U.S. Dist. LEXIS 26822 (S.D.G.A.) 12

CIRCUIT/DISTRICT CASES

Anderson v. Marion County Sheriff's Dept., 220 F.R.D. 555 (S.D. Ind. 2004) 14

Bell v. Woodward Governor Co., 2004 U.S. Dist. LEXIS 1052 (Jan. 26, 2004) 14

TABLE OF AUTHORITIES – Continued

Page

Braswell v. Haywood Regional Med. Ctr., 352 F. Supp.2d 639 (W.D.N.C. 2005) 16

Bredice v. Doctor's Hospital, Inc., 50 F.R.D. 249 (D.C. 1970) 20

EEOC v. Franklin & Marshall Coll., 775 F.2d 110 (3rd Cir. 1985) 12

Holland v. Muscatine Gen. Hosp., 971 F. Supp. 385 (S.D. Iowa 1997) 12

Johnson v. Nyack Hosp., 169 F.R.D. 550 (S.D.N.Y. 1996) 13

Johnson v. United Parcel Service, Inc., 220 F.R.D. 686 (M.D.Fla. 2002) 13, 14

Lemasters v. Christ Hosp., 791 F. Supp. 188 (S.D. Ohio 1991) 13, 16

Leon v. County of San Diego, 202 F.R.D. 631 (S.D. Cal. 2001) 14

Lizotte v. New York City Health And Hospitals Corp., 1989 U.S. Dist. LEXIS 14114 (S.D. N.Y. 1989) 14

Marshall v. Spectrum Med. Group, 198 F.R.D. 1 (D. Me. 2000) 12

Melendez v. Greiner, 2003 U.S. Dist. LEXIS 19084 (2nd Cir. 2003) 14

Memorial Hosp. for McHenry County v. Shadur, 664 F.2d 1058 (7th Cir. 1981) 3, 11

Nilvar v. Mercy Health Sys., 210 F.R.D. 597 (S.D. Ohio 2002) 13

TABLE OF AUTHORITIES – Continued

Page

Robertson v. Neuromedical Ctr., 169 F.R.D. 80 (M.D. La. 1996) 13

Sonnino v. Univ. of Kansas Hosp. Auth., 220 F.R.D. 633 (D. Kan. 2004) 14

Virmani v. Novant Health, Inc., 259 F.3d 284 (4th Cir. 2001) 3, 11, 12

United States v. Harris Methodist Ft. Worth, 970 F.2d 94 (5th Cir. 1992) 3, 9, 10

Wei v. Bodner, 127 F.R.D. 91 (D.N.J. 1989) 13

GEORGIA STATE CASES

DHR v. Hutchinson, 217 Ga. App. 70 (1995) 16

Eubanks v. Ferrier, 245 Ga. 763 (1980) 20

Hollowell v. Jove, 247 Ga. 678 (1981) 20

McCall v. Henry Med. Ctr., Inc., 250 Ga. App. 679 (2001) 17

CONSTITUTIONS

U.S. Const. amend. IV 3, 9, 10

FEDERAL STATUTES

42 U.S.C. §1983 11

42 U.S.C. §2000(e) 15, 22

42 U.S.C. §11101 *et seq.* 10

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. §11111 *et seq.* 15

42 U.S.C. §11111(a) *et seq.* 2, 15

GEORGIA STATE STATUTES

O.C.G.A. §31-7-133 18

O.C.G.A. §37-5-1 22

O.C.G.A. §50-21-20 16

OTHER STATE STATUTES

L.S.A.-R.S. 13.3715.3 (Louisiana) 18

M.C.L. 331.531 (Michigan) 18

ARTICLES

Hutton, Lawrence R., *Sham Peer Review: A National Epidemic,* Association of American Physicians and Surgeons, Inc. (2006) 18

LEGISLATIVE HISTORY

132 Cong. Rec. 33,177 16

STATEMENT OF FACTS AND COURSE OF PROCEEDINGS BELOW

The written opinion issued by the United States Court of Appeals for the Eleventh Circuit, published at *Christie, et al. v. Adkins,* 488 F.3d 1324 (11th Cir. 2007) and also located at Appendix (1a) of the Petition For Writ of Certiorari filed by the Petitioners held that the state-created medical peer review privilege shall not be recognized in a federal civil rights case alleging discrimination within the peer review process, itself.

The Eleventh Circuit Court of Appeals' opinion includes a comprehensive Statement of Facts And Course of Proceedings Below with which this Respondent agrees. To avoid redundancy herein, Respondent respectfully refers the Court to that opinion and shall not reiterate same herein.

INTRODUCTION

Petitioners present no "compelling reasons" for their Petition for a Writ of Certiorari to be granted. *See* Sup. Ct. R. 10. Specifically, Petitioners fail to demonstrate that the Eleventh Circuit's June 12, 2007 Opinion is in conflict with a decision of this Court or another Circuit Court of Appeals, or that the Eleventh Circuit has decided an important federal question which has not already been settled by this Court. *See* Sup. Ct. R. 10(a)-(c). Nor have they

demonstrated that there is a conflict among the decisions of this Court.

In fact, Petitioners fail to give more than cursory discussion of the fact that Congress has already "spoken" on this issue by expressly exempting civil rights cases from the Health Care Quality Improvement Act, which provides immunity for participants of peer review committees. *See* 42 U.S.C. §11111(a)(1).

Petitioners further fail to address the fact that although state laws *do* recognize a medical peer review privilege, many, if not all of the state laws create an exception to the privilege where there is bad faith participation within the peer review process itself.

As illustrated in more detail below, Petitioners have presented no viable reasons for this Court to review the question presented at this time, thus their Petition For Writ of Certiorari should be denied.

SUMMARY OF THE ARGUMENT

Petitioners contend that there is a conflict in two major decisions issued by this Court, to wit, *University of Pennsylvania v. EEOC,* 493 U.S. 182 (1990) and *Jaffee v. Redmond*, 518 U.S. 1 (1996) requiring resolution by this Court. This is incorrect. In *Univ. of Penn.* an important privilege was *not* recognized under federal law where the discrimination complained of occurred within the peer review

proceedings, themselves. 493 U.S. 182 (1990). Conversely, in *Jaffee,* plaintiff attempted to obtain psychiatric information about a police officer whom she was suing for a separate state wrongful death claim. 518 U.S. 1. The two cases are thus not in conflict, are distinguishable and present no reason for this Court's review.

Nor does the Eleventh Circuit's decision in the instant case conflict with *Jaffee*, as it is a limited holding and gives clear guidance to when the privilege will not be recognized.

Petitioners additionally strenuously argue that there is a split in the Circuits created by *United States v. Harris Methodist Ft. Worth,* 970 F.2d 94 (5th Cir. 1992) which requires resolution by this Court. However, that court specifically did not base its decision on the peer review privilege and rather decided the case based on the reasonableness of administrative searches under the Fourth Amendment. In fact, that court addressed the privilege only in passing and based its holding on other grounds. It thus has little, if anything, to do with the Court of Appeals decisions which *have* addressed this issue and which have *all* determined that the medical peer review privilege must yield to civil rights claims alleging discrimination within the process, itself. *See Virmani v. Novant Health, Inc.*, 259 F.3d 284 (4th Cir. 2001); *Memorial Hosp. For McHenry County v. Shadur*, 664 F.2d 1058 (7th Cir. 1981) and the instant

case, *Christie v. Adkins, et al.,* 488 F.3d 1324 (11th Cir. 2007).

Petitioners contend all states recognize a medical peer review privilege, thus this Court should acquiesce to the dictates of state law and likewise establish an air-tight privilege under federal law. This argument ignores the fact that even state medical peer review laws exempt from immunity those individuals acting in bad faith or with malice within the process, itself.

Petitioners also contend that due to the importance of confidential medical peer review proceedings, failing to recognize a privilege within the context of federal discrimination cases will eviscerate the public health benefits provided by medical peer review. While it cannot be disputed that medical peer review provides an important public purpose, it also cannot be denied that ferreting out invidious discrimination is likewise, if not a more compelling public policy issue. There are furthermore many quality of care and public health benefits to be derived from ensuring that competent minority physicians be protected from hindrance to their medical practices by those who are motivated by hatred and fear.

Further, an additional policy rationale for the confidentiality of medical peer review documentation is to protect it from being utilized by plaintiffs to prove standard of care issues in state medical malpractice actions. Failing to recognize the privilege in the limited context of federal discrimination claims

within the peer review process itself will not eviscerate such protections and those physicians acting in good faith within the process have nothing to fear.

REASONS FOR DENYING THE PETITION

I.

There Is No Conflict Between Decisions Rendered By This Court Requiring This Court To Hear This Case

Petitioners argue that because there is a conflict in two major decisions issued by this Court, to wit, *University of Pennsylvania v. EEOC,* 493 U.S. 182 (1990) and *Jaffee v. Redmond*, 518 U.S. 1 (1996), this Court should hear this matter in order to resolve same. However, a reading of the two decisions reveals that there is no true conflict.

Jaffee, 518 U.S. 1, 116 S.Ct. 1923, is simply not in conflict with this Court's ruling in *Univ. of Penn. v. EEOC*, 493 U.S. 182, nor with the Eleventh Circuit's ruling in the instant case. *See Appendix 1(a). Jaffee* involved a police officer who was being sued under state law for wrongful death due to her use of excessive force in fatally shooting an individual. 518 U.S. at 5, 116 S.Ct. 1923. The plaintiffs there sought notes from a psychotherapy counseling session that the police officer had participated in. *Id.* The psychotherapy sessions did not, however, form the basis of the underlying claim of excessive force. *Id.* There was thus a compelling reason to recognize the psychiatrist-patient privilege and the

Court found this privilege more important than assisting that plaintiff in proving her wrongful death case. This fact is a critical distinction.

In *Univ. of Penn*, 493 U.S. 182, 110 S.Ct. 577, on the other hand, a professor alleged she was denied tenure due to racial and sexual discrimination within the University peer review process. The University argued that the Court should recognize a peer review privilege within the University process which, it asserted, was "necessary to protect the integrity of the peer review process, which in turn is central to the proper functioning of many colleges and universities." *Id.* at 189.

This Court rejected that argument and expressly declined to extend the peer review privilege to that discrimination case, as it found that the costs associated with discrimination far outweighed the costs associated with the disclosure of peer review information. *Id.* at 193. Of particular import in that case was this Court's reasoning that because it was alleged that the discrimination actually occurred *within* the peer review process, itself, the discovery of same was especially relevant. *Id.*

The two cases thus do not create a conflict. Had they done so, this Court would have expressly overruled *Univ. of Penn.*, which it did not. This Court aptly noted that where discrimination occurs within the peer review process, itself, the privilege must fail. In *Jaffee,* however, where the reason for seeking privileged material does not occur within the privileged

process itself, the Courts must be guided by a laundry list of factors before recognizing an important privilege. 518 U.S. 1. This broader list takes into account whether a privilege generally "promotes sufficiently important interests to outweigh the need for probative evidence." 518 U.S. at 9-10.

Petitioners suggest that the Eleventh Circuit Court of Appeals' decision in the instant matter somehow conflicts with this Court's reasoning in *Jaffee*. 518 U.S. 1. Petitioners assert that *Jaffee* expressly rejected a "case by case" analysis to determine the recognition of a state privilege under federal law. The Eleventh Circuit did not, however, deviate from the rule enunciated in *Jaffee*. 518 U.S. 1. Its limited holding was simply that the peer review privilege would not apply in a federal case based upon discrimination within the peer review process, itself. *See Appendix 1(a)*. The Eleventh Circuit found, like in *Univ. of Penn.*, 493 U.S. 182, that eradicating discrimination was a more compelling reason to decline recognition of the peer review privilege than the need for confidentiality of documents. Thus, as required by *Jaffee*, the Eleventh Circuit provided a "forward looking test." 518 U.S. at 13. Every participant will know moving forward that the peer review privilege will not be recognized in a federal discrimination case.

The mischief sought to be avoided in *Jaffee* was the uncertainty created by a "case by case" analysis of whether to recognize a privilege under federal law. 518 U.S. 1. The Eleventh Circuit did not create a rule by which a case by case analysis will be conducted. It

merely held that in *all* cases of discrimination within the peer review process itself, the peer review privilege shall not be recognized. *See Appendix 1(a).* Nor did the Eleventh Circuit suggest the peer review privilege would *never* apply in another type of case, such as where a party seeks peer review documentation to support an underlying case which does not involve discrimination within the process itself, which was, in fact, the situation in *Jaffee.* 518 U.S. 1.

Likewise, as outlined in *Univ. of Penn.*, where discrimination occurs within the peer review process itself, and where the interests to be weighed are promoting healthcare or eradicating invidious discrimination, the interests in eradicating discrimination must prevail. 493 U.S. 182. Further, supporting minority physicians' ability to practice medicine in our countries' hospitals is a benefit worth promoting in order to assist in quality of healthcare to our citizens.

Because there is no conflict between the Eleventh Circuit's decision or this Court's cases, Petitioners have not presented a sufficient reason for this Court to hear this matter.

II.

There Does Not Exist A Split In Any Circuit Regarding This Issue Thus Resolution Is Not Required By This Court At This Time

Petitioners argue that there is a split in our nations' Circuit Courts which warrant this Court's

consideration. They base this "split" solely upon the decision in *United States v. Harris Methodist Ft. Worth*, 970 F.2d 94 (5th Cir. 1992). However, that case is not on point, creates no split in the Circuits and was premised on a different issue than the medical peer review privilege.

In *Harris*, the Department of Health and Human Services ("HHS"), a governmental agency, attempted to conduct a Title VI compliance review of a hospital chosen at random. 970 F.2d at 96. In attempting to conduct said review, HHS requested peer review materials on every physician at the hospital. *Id.* HHS argued that it was permitted to conduct an "administrative search" under Title VI of the Civil Rights Act as the hospital received federal funds. *Id.* It further argued that because the hospital had executed compliance assurance documents, it had consented to the administrative search. *Id.*

The Fifth Circuit Court of Appeals held that whether or not the administrative search could be conducted (and whether there was consent to same) was based on the objective reasonableness standard outlined by the Fourth Amendment. *Id.* at 100. Thus, only if the search was "reasonable" would it be permissible under Title VI. *Id.*

The Court found because the particular hospital was selected arbitrarily, without any guidelines and that the decision was made by a field officer with unreviewed discretion, that it was an unreasonable search under the Fourth Amendment. *Id.* at 101-02.

The Court thus declined to permit HHS to conduct the requested administrative search and found that any "consent" to the search did not trump the unreasonableness standard. *Id.*

The only portion of the *Harris* decision which dealt with the medical peer review privilege aspect of the case, expressly held that "HHS cannot administratively override the goal of Congress in enacting the Health Care Quality Improvement Act, 42 U.S.C. §§11101, 11137(b)." *Id.* at 103. The Court went on to hold that "because we affirm the district court's determination that the proposed search exceeded bounds of reasonableness, we need not define the scope of any applicable privilege." *Id.*

Thus, because *Harris* analyzed an administrative search under Title VI and under the Fourth Amendment, and because it expressly failed to reach a decision regarding the medical peer review privilege, it simply creates no split in any Circuit in the United States dealing with this issue. The court in *Harris* addressed the privilege only in passing and based its holding on other grounds. *Id.*

Contrarily, of all of the Circuit Courts of Appeals which *have* decided whether or not the medical peer review privilege is applicable in a civil rights action alleging discrimination (within the peer review process itself) the decisions are unanimous. Each Circuit reviewing this issue has found that the privilege must fail in these types of cases.

For example, in *Virmani v. Novant Health, Inc.*, 259 F.3d 284 (4th Cir. 2001) the Fourth Circuit indicated that "in contrast to a discrimination case, in which the plaintiff's claim arises out of the peer review proceedings, a plaintiff's claim in a medical malpractice case arises from actions that occurred independently of the review proceedings." The Fourth Circuit indicated that there is no evidence that state legislatures considered the potential impact on discrimination cases of a privilege for medical peer review proceedings. Thus, the state's policy decisions reflected different concerns than those implicated in a discrimination case. *Id.* This is particularly salient since discrimination claims pursuant to Title VII and 42 U.S.C. §1983 are peculiar to the federal arena and are not typically adjudicated in state courts.

Likewise, in *Memorial Hosp. for McHenry County v. Shadur*, 664 F.2d 1058 (7th Cir. 1981), the Seventh Circuit failed to recognize a medical peer review privilege in an antitrust action which alleged a physician was discriminated within the peer review process itself. The Court held that unlike in "the context of a medical malpractice claim [failing to recognize a privilege] will have little impact on the plaintiff's ability to prove a meritorious claim. For the crucial issue in that type of case is not what occurred at the review proceeding but whether the defendant was in fact negligent in his care and treatment of the plaintiff." *Id.* at 1061.

In the Eleventh Circuit below, the privilege was also denied on the same rationale utilized in *Univ. of*

Penn., 493 U.S. at 193 and the Fourth Circuit's analysis in *Virmani*, 259 F.3d at 289. *See Appendix 1(a).*

In fact, even before the instant case was decided, the district court in the Middle District of Georgia declined to recognize a medical peer review privilege in a discrimination claim requiring peer review documents to be turned over to a plaintiff-physician who alleged he had been discriminated against by the peer review committee. *See Marshall v. Americus-Sumter County Hosp. Authority,* 2002 U.S. Dist. LEXIS 26822 (S.D.G.A.).

It is thus clear that there are three (3) Circuit Courts of Appeals that have decided this issue, all of which declined to recognize the medical peer review privilege within the context of a discrimination claim arising from discrimination within the peer review process itself.

There is simply no split in the Circuits arising which makes the resolution of this matter ripe for this Court at this time.

Of further note is the fact that the majority of district courts have likewise ruled against recognition of the medical peer review privilege. *See, e.g., EEOC v. Franklin & Marshall Coll.*, 775 F.2d 110, 116 (3rd Cir. 1985) (peer review subject to discovery when discrimination alleged within the process); *Marshall v. Spectrum Med. Group,* 198 F.R.D. 1, 5 (D. Me. 2000) (declining to recognize privilege in discrimination suit brought pursuant to Americans with Disabilities Act); *Holland v. Muscatine Gen. Hosp.,* 971

F. Supp. 385, 390 (S.D. Iowa 1997) (declining to recognize privilege in Title VII claim); *Johnson v. Nyack Hosp.*, 169 F.R.D. 550, 561 (S.D.N.Y. 1996); *Robertson v. Neuromedical Ctr.*, 169 F.R.D. 80, 83-84 (M.D. La. 1996); *Lemasters v. Christ Hosp.*, 791 F. Supp. 188, 191 (S.D. Ohio 1991); *Wei v. Bodner*, 127 F.R.D. 91, 101 (D.N.J. 1989).

Some districts refer to the peer review privilege as the "self critical analysis privilege" or the "self analytical privilege" however it remains the same in substance. A majority of these district courts have likewise refused to honor it in discrimination cases such as the instant matter. *See, e.g., Johnson v. United Parcel Service, Inc.*, 220 F.R.D. 686 (M.D. Fla. 2002). Indeed, the U.S. District Court for the Southern District of Ohio indicated that

> while some cases discuss a "self-critical analysis" privilege, and others discuss a "peer review privilege" the two concepts stem from the same trunk. Some courts note a distinction between the two, others do not. The "self-critical analysis" is merely a way of describing, for example, a hospital's regular review, or evaluation, of its own in-house practices, and the work of its care-givers. It is, in other words, a more broadly focused, or generalized variant of peer review, which itself tends to be case-specific.

Nilvar v. Mercy Health Sys., 210 F.R.D. 597, 604, n.12 (S.D. Ohio 2002).

Regardless of the term utilized, the basic privilege and the analysis regarding its application to federal discrimination cases remains the same. *See, e.g., Bell v. Woodward Governor Co.*, 2004 U.S. Dist. LEXIS 1052 (N.D. Ill., Jan. 26, 2004), *Melendez v. Greiner*, 2003 U.S. Dist. LEXIS 19084 (2nd Cir. Oct. 22, 2003); *Johnson*, 220 F.R.D. 686 (M.D. Fla. 2002); *Leon v. County of San Diego*, 202 F.R.D. 631 (S.D. Cal. 2001); *Lizotte v. New York City Health And Hospitals Corp.*, 1989 U.S. Dist. LEXIS 14114 (S.D. N.Y. 1989); *Anderson v. Marion County Sheriff's Dept.*, 220 F.R.D. 555, 561 (S.D. Ind. 2004) (*holding* "the deliberative process privilege is unavailable where, as here, the plaintiff alleges discrimination under 42 U.S.C. §1983"); *Sonnino v. Univ. of Kansas Hosp. Auth.*, 220 F.R.D. 633, 644-645 (D. Kan. 2004) (*holding* "neither the Supreme Court nor the Tenth Circuit has recognized a medical peer review or medical risk management privilege under federal common law . . . nearly all of the cases that have weighed the state-law medical peer review privilege against the interests advanced by the federal anti-discrimination laws have concluded that the privilege does not preclude discovery of peer review materials").

In sum, cases emanating either from the district trial courts or the Circuit Courts of Appeals from the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and now Eleventh Circuits have *all* declined to recognize a medical peer review privilege in the context of a federal discrimination claim.

This Court thus need not hear this matter at this time, as an overwhelming majority of district courts and all three (3) of the Circuit Courts of Appeals hearing the issue are not in conflict.

III.

Congress Has Already Addressed this Issue by Way of the Health Care Quality Improvement Act

In 1986 (as revised in 1989) Congress enacted the Health Care Quality Improvement Act ("HCQIA") in order to provide immunity from damages to individuals participating in professional review committees provided certain conditions are met. 42 U.S.C. §11111 *et seq.* An important exception to that act is relevant herein.

For example, the Act specifically exempts from its provisions "damages under any law of the United States or any State relating to the civil rights of any person or persons, including the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.* and the Civil Rights Acts, 42 U.S.C. §1981 *et seq.*" *See* 42 U.S.C. §11111(a)(1)(D).

It is thus clear that Congress specifically considered discrimination actions brought within the context of the peer review process itself and decided to expressly exempt them from the Act's purview. It is a basic rule of statutory construction that if something is expressly mentioned, the inference is stronger that those portions omitted were intended as such, than if

nothing at all was mentioned. *See* O.C.G.A. 50-21-20; *DHR v. Hutchinson,* 217 Ga. App. 70, 456 S.E.2d 642 (1995).

Although Petitioner argues that the HCQIA merely immunizes a peer review participant from damages, but does not speak to whether or not confidential documents are discoverable, this argument is displaced. For example, it has been held that the HCQIA did not apply, and could not be construed as limiting discovery of peer review documentation in civil rights cases. *See Lemasters v. Christ Hosp.,* 791 F.Supp. 188 (S.D. Ohio 1991); *Braswell v. Haywood Regional Medical Center,* 352 F. Supp.2d 639 (W.D.N.C. 2005); *Azeez P. Adeduntan v. Hosp. Auth. Of Clarke County,* 2005 WL 204248 (M.D.G.A.) (*holding* HCQIA does not bar peer review from disclosure in those cases where the peer review process itself is at issue.).

Petitioners argue that Representative Waxman (a sponsor of the House Bill) specifically addressed discovery of peer review documentation by stating, "I understand there are a number of State shield laws that restrict the type of evidence that may be introduced in lawsuits challenging a disciplinary action in the context of peer review. Nothing in this bill is intended to preempt or override any such State shield law." *See* 132 Cong. Rec. 33,177.

Although it cannot be determined that the necessary votes in both the House and the Senate agreed with such commentary, Representative Waxman was

expressly referring to the State shield laws which restrict discovery in malpractice actions against physicians and not the type of situation presented here. Had he been referring to same, there would not, of course, be a clear exemption for Civil Rights cases contained in the statute itself.

To that end, as Congress has already spoken on the issue, there is no need for this Court to review this claim unless and until Congress amends the Act.

IV.

State Peer Review Laws Create An Exception For Immunity Where Participants Act With Malice Or Bad Faith

Petitioners argue that effective (and confidential) medical peer review is essential to providing the public with quality healthcare. Certainly, it cannot be denied that peer review serves an important function in our society. It promotes effective supervision of healthcare professionals and treatment of those physicians in need of instruction or rehabilitation in terms of their practice performance.

However, medical peer review committees are a creation of statute and must be strictly construed and not extended beyond their spirit and "precisely stated limits." *McCall v. Henry Medical Center*, 250 Ga. App. 679, 551 S.E.2d 739 (2001).

Although virtually every state has enacted statutes providing for either immunity from lawsuits to peer review participants and/or confidentiality of the peer review documents, most of those same statutes provide an exception for participants who act with malice, fraud or bad faith within the process, itself. *See, e.g.,* O.C.G.A. §31-7-133 (Georgia); M.C.L. 331.531 (Michigan); LSA-R.S. 13.3715.3 (Louisiana) and similar statutes in Pennsylvania, Maryland, Texas, New York, New Jersey, Oklahoma, California, Missouri and Tennessee, to name a few.

It is thus apparent that even within the state peer review confidentiality statutes, it is recognized that actions taken with malice towards a physician will exempt the participant from immunity. Certainly, there can be no greater malicious act than invidious discrimination, whether it be based upon race, national origin or gender. This is especially so when minority physicians of all sorts have consistently assisted our healthcare systems in valuable ways.

In fact, it is a recognized fact that "sham" peer review processes have begun in our country where the confidentiality and privileges associated with peer review are utilized to rid hospitals of physicians for the hospitals' improper motives. *See* Hutton, Lawrence R., *Sham Peer Review: A National Epidemic,* Association of American Physicians and Surgeons, Inc. (2006).

Thus, Petitioner's argument that because all states recognize a peer review privilege under state law that this Court must likewise do so is simply not

a basis for this Court's review. As nearly all states have carved out an exception for malicious behavior within the process, itself, the Eleventh Circuit's opinion is thus in accordance with the states' policies.

V.

An Exception To The Peer Review Privilege Will Have No Substantial Effect On Those Participants Acting In Good Faith And Failing To Discriminate

Admittedly, it is important to the quality of health care to keep peer review documentation and discussions confidential. However, there is a distinction which Petitioners fail to address regarding the quality of care benefits derived from the existence of medical peer review, itself, and one of the compelling reasons for requiring actual peer review documents be completely *privileged* from disclosure. The distinction is between medical peer review and the medical peer review *privilege*.

Medical peer review committees themselves were created in order to provide peer-to-peer teaching mechanisms and to ferret out physicians who failed to meet proper standards of care. However, the confidential nature of said proceedings and privilege from disclosure of all documents/communications therein were created, in large part, to allow participants to speak candidly about another's performance *and* to prevent a potential state medical malpractice plaintiff from obtaining the documentation in order to prove a

breach of the standard of care. *See Eubanks v. Ferrier*, 245 Ga. 763, 267 S.E.2d 230 (1980). In that case it was held that denying a malpractice patient access to the records was not a violation of either due process or equal protection. *Id. See also Hollowell v. Jove*, 247 Ga. 678, 680, 279 S.E.2d 430, 432-33 (1981) ("[t]he statute legislatively approves the view that [c]onstructive criticism cannot occur in an atmosphere of apprehension that one doctor's suggestion will be used as a denunciation of a colleague's conduct in a malpractice suit" *citing Bredice v. Doctor's Hospital, Inc.*, 50 F.R.D. 249, 250 (D.C. 1970).

Petitioners argue that by failing to recognize a medical peer review privilege in the limited context of civil rights claims alleging discrimination within the peer review process itself will "eviscerate" the public health benefits provided by such peer review. They argue that physicians will not participate in peer review if they know that their comments and/or documents are discoverable. In support of this argument they point to one small, rural county in western Georgia. Petitioners miss the point, however. If physicians do not act with discriminatory animus in the peer review proceedings, they have nothing to worry about. The exception carved out is a narrow one indeed and will not subject disclosure of documentation which can be used by the public to support malpractice actions to which the physicians must be concerned. All they need do is to refrain from discrimination.

As aptly noted in *Blaubergs v. Board of Regents of the University System of Georgia,* 661 F.2d 426 (5th Cir. Unit B 1981)

> Persons occupying positions of responsibility . . . often must make difficult decisions. The consequence of such responsibility is that occasionally the decision-maker will be called upon to explain his actions. In such a case, he must have the courage to stand up and publicly account for his decision. If that means that a few weak-willed individuals will be deterred from serving in positions of public trust, so be it; society is better off without their services. If the decisionmaker has acted for legitimate reasons, he has nothing to fear. We find nothing heroic or noble about the appellant's position, we see only an attempt to avoid responsibility for his actions.

Id. at 432.

Likewise here, so long as the decision-makers do not act with discriminatory animus, then they should not object if their decisions or discussions are questioned in a federal civil rights lawsuit. In fact, such documentation would most likely support their argument that no such discrimination occurred. To that end, physicians will not realistically be "chilled" from participating in medical peer review committees.

In fact, pursuant to Georgia Statutes, O.C.G.A. §37-5-1, the appointment of peer review groups and compliance therewith is required for the granting or renewing of a hospital's license. Thus, physicians will be required to continue to serve on committees, and like all public agencies, will be subject to anti-discrimination requirements.

Failing to exempt the privilege in federal discrimination cases will only have a chilling effect on "closed-door" discrimination sessions. If this occurs, it is certainly a chilling effect worth promoting and one that comports with over 40 years of federal jurisprudential efforts to eradicate invidious discrimination. *See* Title VII of the Civil Rights Act, 42 U.S.C. §2000(e) *et seq.*

Certainly, then, Petitioners' "parade of horribles" that the entire system of quality health care in our country will be chilled is not realistic and does not serve as a compelling reason for this Court to review this case.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ALTHEA L. BUAFO
Counsel of Record

BERNADETTE C. CRUCILLA

BUAFO & ASSOCIATES
P.O. Box 4012
201 Spring Street
Macon, Georgia 31208
(478) 743-8337